No. 12042

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ERNEST J. UARTE,

Appellee.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

Statement of Pleadings and Facts Upon Which It Is Contended That the District Court Had Jurisdiction.

Appellee alleges the negligence of employees of the United States of America, to-wit, one or the other of two members of the United States Navy.

Jurisdiction is invoked under the provisions of Title 28, United States Code, Section 921 *et seq.*, commonly known as the Federal Tort Claims Act (now Title 28, United States Code, Sec. 1346), which provides:

> "(b) Subject to the provisions of chapter 173 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal

> Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the *law of the place where the act or omission occurred.*" (Italics added.)

Appellants have appealed to this Court pursuant to Title 28, United States Code, Section 1291.

Statement of the Case.

Appellee filed this action against appellant, Department of the Navy; Twelfth Naval District; Golden State Company, Ltd.; Don Arthur McCoy, and others. Appellee alleged negligence in the operation of a motor vehicle by one or the other of two United States Navy enlisted men as the result of which appellee suffered severe personal injury. Both Navy men died as the result of the accident.

Another action was brought in the Superior Court of Madera County wherein the widows of the two Navy men, Richard Francis Rogers and Roger Davis Green, sued this appellee and the Golden State Co., Ltd., for wrongful death. At the trial, the jury disagreed on the liability of appellee and the Court granted a non-suit as to Golden State Co., Ltd. On appeal, the District Court of Appeal reversed the order of non-suit and the case is presently

set for trial on the question of the liability of both appellee and Golden State Co., Ltd.

This complaint alleges that one or the other of the Navy men "operated and used said Ford station wagon, and defendant Don Arthur McCoy negligently drove, operated and used said tractor and semi-trailer, and thereby *caused said Ford station wagon to collide with a Ford sedan automobile owned and driven by plaintiff, and caused said Ford sedan automobile to come into collision with said tractor and semi-trailer,* injuring and damaging plaintiff and his said Ford sedan automobile as is hereinafter described." (Italics added.)

The tractor and semi-trailer were owned by the Golden State Co., Ltd., and driven by Don Arthur McCoy. After motion of the appellant all parties defendant except the appellant were dismissed from the action either voluntarily or by the Court on the ground that the United States alone was a proper party defendant under the Federal Tort Claims Act.

Both occupants of the government vehicle were killed in this accident. The appellee suffered amnesia as a result of the accident and claims loss of memory of all events for some time prior to the accident and up until weeks after he had been hospitalized for his injuries.

The only known and undisputed facts are those set forth in a stipulation filed on the first day of trial [Tr. pp. 30-31] that appellee's and appellant's vehicles were both proceeding south on U. S. Highway 99, 2.6 miles north of Madera, California, and that a Golden State trac-

tor and semi-trailer was proceeding north on said highway. It is also undisputed that the accident occurred about 11:30 o'clock P. M. on a wet, rainy night and that the road was very slippery. The highway was a 22-foot, two-lane, paved highway at the point of the accident. The highway had paved shoulders on both sides.

It is the contention of the appellant that beyond these established facts the appellee utterly failed to show the slightest act of negligence proximately causing or contributing to the injuries of the appellee. The counterclaim of appellant asked damages for the destruction of its vehicle.

At the close of the plaintiff's case [Tr. p. 195] appellant moved for a dismissal of the action on the ground of a total failure of proof of negligence. This motion was renewed at the close of all of the evidence [Tr. p. 291]. The motion was denied.

Appellant's Specification of Errors.

I.

That the District Court erred in granting judgment for the appellee, and against the appellant herein, for the following reasons:

(a) The trial court's findings of fact on the issue of negligence of the Government driver were clearly erroneous in that they were unsupported by the evidence adduced.

(b) The appellant's motion for a judgment of dismissal and/or non-suit at the close of the appellee's case, and at the close of all the evidence, should have been granted.

(c) The Court erred in hearing testimony relative to the speed of the appellant's vehicle at a distance of 10 to 11 miles from the scene of the accident.

(d) The Court erred in hearing testimony relative to the speed of the appellant's vehicle at a distance of 4 to 5 miles from the scene of the accident.

(e) The Court erred in permitting Don McCoy to be called and examined as an adverse witness by the appellee under the provisions of Rule 43(b), F. R. C. P.

(f) The Court erred in overruling the appellant's objections to the appellee's findings of fact.

II.

That the District Court erred in not granting judgment for the appellant on its counter-claim against the appellee herein.

Summary of Appellant's Argument.

The appellant admittedly has a difficult and exacting task on appeal in showing, to the satisfaction of the Court, that there was, in fact, not one iota of evidence, much less a preponderance of evidence, to support the District Court's finding of negligence on the part of the Government employees. If such finding was erroneous, the Court again erred in not dismissing the action.

Appellant further contends that the Court erred in permitting the introduction of evidence as to the speed of the Government vehicle in isolated instances at remote dis-

tances of 5 and 11 miles without any additional evidence showing the speed or manner of operation of said vehicle between those remote points and the scene of the accident, or any evidence indicating that the speed of the Government vehicle was in any way a cause of the accident.

The Court erred in permitting Don McCoy to be called and examined as an adverse witness by appellee pursuant to Rule 43(b), F. R. C. P.

The Court's statements at the trial indicated clearly that it thought the appellant's vehicle struck the Golden State truck first instead of appellee's vehicle striking the truck as alleged in the complaint. This view was so untenable under the evidence that the Court, in its Findings of Fact, withdrew to the safer ground afforded by the allegations of the complaint. Appellant contends that the Court, like the only parties present at the scene of the accident who survived, was entirely at a loss to reach a logical conclusion as to what actually transpired at the scene of the accident. In this regard it should be noted that only Don McCoy and his wife actually saw the accident and are mentally able to relate their observations.

If appellant's contentions are otherwise correct, the Court erred in not granting judgment on appellant's counterclaim.

APPELLANT'S ARGUMENT.

I.

The District Court Erred in Granting Judgment to Appellee.

(a) The Findings of Fact Are Unsupported by the Evidence.

This is an extremely unusual case in that the Government driver and passenger were killed, the appellee claims amnesia, his passengers were admittedly asleep when the accident occurred, and the driver and passenger in the Golden State truck saw only a portion of what transpired. Therefore, a very careful examination of all the evidence received will be necessary to fully appraise this case. The printed transcript contains the entire record of the trial including *all* testimony and evidence.

The appellee alleged that the Government car struck appellee's car causing appellee's car to strike the Golden State truck. The Court adopted this view in its findings.

The known facts are mostly covered by a stipulation filed on the first day of trial [Tr. pp. 30-31]. These concede that both appellant's and appellee's cars were proceeding south on U. S. Highway 99 about 2.6 miles north of Madera, California. The Golden State truck was proceeding north on the same highway. The truck-tractor and semi-trailer was approximately 57 feet in length [Tr. pp. 45 and 152].

The highway was wet and slippery, it being the first rain of the season [Tr. p. 63]. The highway was 22 feet wide and was divided by a white line down the center. There were 7-foot paved shoulders on each side of the road [Tr. p. 40].

The physical facts show that after the accident was over the Golden State truck had jackknifed to the left, that only the trailer remained on the highway (at right angles across the road), and the tractor and semi-trailer were headed south [Ex. 13]. The Government car stood sideways on the road about 40 feet *north* of the trailer and the Green Ford (appellee's car), stood in a field nearly 94 feet *south* of the trailer [Ex. 13]. Thus appellee's car had passed *beyond* the Golden State truck while the Government station wagon was still to the *north* of the truck.

From this point on any theory on the part of either of the parties as to what actually occurred must be pure conjecture. The appellant has a theory as to what transpired. Likewise the appellee has one. The appellant will point out wherein the meagre evidence available supports appellant's theory and lends no aid or substance whatever to the contentions of the appellee.

In a negligence action, the plaintiff must prove negligence by a preponderance of the evidence. In this case we shall point out that there is not one iota of evidence, much less a preponderance of evidence, to show negligence of Government employees proximately causing the accident in question.

Appellee's theory is set forth above. The appellant also has a theory as to what might have transpired. First of all, a reading of the transcript of the trial will reveal that there is no evidence as to which of the two cars (appellee's or appellant's) was first to approach the northbound Golden State truck. Don McCoy stated, however, that appellee's car was first to hit him [Tr. p. 125] and that he did not see one car attempt to pass the other [Tr. p. 124]. Therefore, if any assumptions are to be made as to which car was first, they should lean toward that car

being that of appellee. As appellee and his companions had been driving from north of Sacramento during the afternoon and through a dark, rainy evening to about 11:30 P. M., and as all appellee's companions were asleep [Tr. pp. 172, 176], it is not unlikely that appellee fell asleep at the wheel, or he blew a tire, and he lost control of his car. Evidence shows appellee's car had smooth tires [Tr. pp. 202, 254, 266, 271]. It should be noted that there is no physical evidence of a contact between appellee's and appellant's car or any testimony indicating that there was such a contact prior to the collision with the truck. Plaintiff introduced no evidence to show physical damage to the vehicles indicating contact between appellee's car and the Navy station wagon. Support is afforded appellant's theory by the statement of Don McCoy [Tr. p. 134], admittedly a conclusion or guess [Tr. p. 157], that appellee "was clipped, *blew a tire, or skidded, or something.*" (Italics ours.) Weight is added to this theory by McCoy's statements [Tr. pp. 149 and 157] that he saw no impact between the vehicles. In addition, *the physical evidence shows that appellee's car must have struck the truck first because it went past the truck* [Ex. 13] *after the impact.* Further, when appellee hit the truck, the driver of the truck lost control [Tr. pp. 139 and 155] and the truck jackknifed [Tr. pp. 154, 155]. The fact that *the Government station wagon ended up 40 feet north of the truck* proves, we believe, that the station wagon struck the truck as the truck was jackknifing into the station wagon's lane of traffic. It thus never got beyond the point of impact and in fact was bounced back by the impact. Appellant believes that the Government car was an innocent participant to this accident, that it was following appellee's car down the highway, and that

the Government car first participated in the accident only after appellee had struck the truck and caused it to jackknife in front of the Government car.

Appellee's entire case is, we believe, predicated on the following portions of the evidence:

(1) That on the night of the accident, Don McCoy gave a statement stating that he saw two sets of headlights and then only one, that then the headlights seemed to bunch and jump [Tr. p. 131].

(2) That McCoy had stated at that time "It appears to me that one clipped the other and threw him there, or one blew a tire, or something." [Tr. p. 132.]

(3) That W. R. Daniels, another Golden State Co. driver, had stated he was passed by the Navy car 4 to 5 miles from the scene of the accident [Tr. p. 108], and that at that time the Navy car was traveling about 70 to 80 miles an hour [Tr. p. 110], and had passed over a double line [Tr. p. 111].

(4) That Allan Roberts had stated that he was passed by the Navy car 10 or 11 miles from the scene of the accident [Tr. p. 96], and that at that time the Navy car was traveling about 70 to 80 miles per hour [Tr. p. 96], and skidded as it was passing [Tr. p. 97].

This testimony is the only part of the record helpful to appellee's case. It, however, does not show wherein the Navy car was negligent.

The weaknesses of this testimony are clear. The testimony attributed to Don McCoy was elicited only from the statement made the night of the accident. McCoy stated

that this statement was purely a conclusion [Tr. pp. 129, 157] because he did not see the appellee's car and the Navy car collide or touch each other [Tr. pp. 149, 157], he never saw these cars abreast of each other [Tr. p. 148], he never saw headlights come into the northbound lane of the highway before Uarte swerved [Tr. p. 149], he could not say one car was overtaking the other [Tr. p. 150], he refused to state that the Uarte car was "clipped" [Tr. p. 134], he was unable to estimate the speed of the approaching vehicles [Tr. p. 124], and his impression was that one vehicle did not start around the other [Tr. p. 124]. Further, he definitely identified the Uarte car as the one which skidded in front of him and hit his truck [Tr. pp. 125, 144]. He was examined by appellee as an adverse witness pursuant to F. R. C. P. Rule 43(b), although his position in the case was actually adverse to the United States.

The testimony of Allan Roberts and W. R. Daniels at distances 10 to 11 and 4 to 5 miles from the scene of the accident was entirely remote as far as any evidence of negligence was concerned. Roberts stated the station wagon went right out of sight and was not seen again until the scene of the accident was reached 12 minutes later [Tr. pp. 97, 102]. Daniels testified that the station wagon passed out of sight as soon as it went around the rig ahead, still 4 to 5 miles from the scene of the accident [Tr. p. 118]. Both witnesses stated that they did not see the Navy car again until the scene of the accident. Thus they were not in a position to trace the speed, or the manner of operation, of the Government vehicle up to the scene of the accident. Their testimony is therefore not only valueless on the question of negligence, but should have been held inadmissible.

Some point may be made by the appellee that the amount of damage sustained by the station wagon indicates excessive speed. The same is true of the appellee's car. However, the Court can take judicial notice of the fact that the more or less flimsy superstructure of a station wagon will sustain greater damage at an identical speed than would a vehicle with an all steel top, as that of appellee. Furthermore, the highway speed at this point was 55 miles per hour and any differentiation between the amount of damage that would be done at 45, or 55, or more miles per hour on a slippery road would be pure conjecture.

It should also be noted that the evidence discloses no markings upon the Navy station wagon to indicate a contact with the Uarte car. In fact, the witness Burgess testified that a careful half-hour examination of the Navy car failed to reveal any traces of green paint or cream paint on that car [Tr. p. 259]. Uarte's car was green [Tr. pp. 59 and 125]. Witness Northridge testified the same [Tr. p. 274]. Witnesses Burgess, Northridge, Segren and McCoy testified to finding cream paint on the left rear of the Uarte car [Tr. pp. 256, 257, 266, 272 and 153]. The Golden State Truck was a cream color [Tr. p. 153]. The Uarte car showed no trace of color similar to that of the blue Navy station wagon [Tr. p. 269]. Two witnesses testified to a deep scratch on the cream colored side of the Golden State semi-trailer [Tr. pp. 206, 152].

There was some evidence of gouge marks on the highway. These defy explanation, but they should not be used to make a case against the appellant just for that reason. No witness could offer a reasonable explanation of these marks or say that the marks arose out of this particular accident.

Exhibit No. 14 shows the position of the bodies, P-1 being the body of one sailor [Tr. p. 178], P-3 the other sailor [Tr. pp. 48, 178], and P-2 Uarte [Tr. p. 178].

The appellant believes that the evidence as set forth above shows what transpired in this case to be as follows: Two cars were going south on a dark, slippery road [Tr. p. 123]. The first car carried appellee [Tr. p. 125]. Suddently that car swerved sharply to the left [Tr. p. 125], and skidded across the highway with the rear wheels reaching the opposite shoulder of the road first [Tr. p. 161], the driver (Uarte) then regained partial control of the car and headed back across the highway toward his proper lane [Tr. pp. 125, 144]. At this point his car struck the right front wheel of the truck tractor [Tr. pp. 125, 126], causing the car to spin to the left and causing the left rear of the car to strike the side of the semi-trailer where it left a deep scratch [Tr. p. 152], and picked up cream colored paint [Tr. p. 153]. This car continued to spin and slid sideways into a field where it came up alongside a parked car. Meanwhile, the driver of the truck lost control of his vehicle when Uarte's car struck his right wheel and set his steering wheel spinning [Tr. p. 155]. The truck, out of control, jackknifed to the left into the position shown in Exhibits 13 and 14 [Tr. p. 137]. While in the process of turning, the truck was struck by the Navy vehicle which had been following behind Uarte. As the truck jackknifed to the left, the first portion of the truck hit was the right front [Tr. p. 144]. The Navy car was crumpled and thrown back but the body of one Navy man was left at the point of impact beneath the rear wheels of the truck trailer [Tr. p. 178].

Prior to the above described events, something caused Uarte to skid. What that something was, no person is

available to state. The statements upon which appellee will rely have been discussed at length. They do not show any act of negligence on the part of Government employees either expressly or by inference. Instead the physical facts indicate that Uarte never came in contact with the Navy car but instead was ahead of the Navy car when some unexplained event, a flat tire, drowsiness, or a slick part of the road, coupled with the fact that his tires were not suited for wet weather travel, caused him to lose control of his car and become involved in this accident. The appellant leaves this point with this challenge to the appellee: *"What* act of negligence of a Government employee is shown by the evidence introduced in the trial of this case?"

(b) Dismissal or Non-Suit Should Have Been Granted.

If the appellant is correct in its proposition that the finding of negligence was not supported by the evidence, then as a matter of law, a judgment of dismissal or nonsuit should have been granted the appellant.

(c) Error in Admitting Evidence of Speed of Government Car 10 to 11 Miles From Scene of Accident.

(d) Error in Admitting Evidence of Speed of Government Car 4 to 5 Miles From Scene of Accident.

The appellant objected to the admission of testimony as to the speed of the Navy vehicle at distances of 10 to 11 miles and 4 to 5 miles, respectively, from the scene of the accident. The improper admission of this evidence was particularly important because it served to prejudice the Court against the appellant.

The testimony in question is that of Allan Roberts who stated that he saw the station wagon 10 to 11 miles before the scene of the accident [Tr. p. 96], and that the station wagon skidded in passing [Tr. p. 97]. W. R. Daniels testified that he was passed by the station wagon 4 to 5 miles from the scene of the accident and that it crossed over a double line in passing Daniels. Objections were made to this testimony and the objections were overruled summarily by the Court despite the proffer of case authorities [Tr. pp. 96, 110-113].

The general rule established by a long line of cases appears to be that evidence of conditions remote in time and distance from the time and place of the accident in question is inadmissible.

> *Blashfield, Cyclopedia of Automobile Law and Practice,* Section 6176.

The California rule appears to be that laid down in *Pruitt v. Krovitz,* 139 P. 2d 992, 59 Cal. App. 2d 666, where the Court said at page 994:

> "As said, however, in Ackel v. American Creamery Co., 12 Cal. App. (2d) 672, 55 P. (2d) 1195, the law is well established in this state that the admission or rejection of evidence as to the rate of speed a vehicle is traveling before a collision occurs rests in the sound discretion of the trial court. The question rests so largely within its discretion that no fact or positive rule can be laid down governing the matter, for which reason the *ruling of the trial court as to the admission or rejection of this sort of evidence will not be disturbed except upon a showing of abuse of discretion.* Ritchey v. Watson, 204 Cal. 387, 268

P. 345; Traynor v. McGilvray, 54 Cal. App. 31, 200 P. 1056; Wagy v. Brave, 133 Cal. App. 413, 24 P. (2d) 209. Here no abuse of discretion is shown." (Italics ours.)

This appellant contends that there has been a *clear abuse of discretion* in the present case.

In this case, witness Roberts stated the station wagon went right out of sight (it was night) after passing him and it was not seen again until the scene of the accident was reached 12 minutes later [Tr. p. 97, 102]. Witness Daniels testified that the Navy car went out of sight after passing the rig ahead [Tr. p. 118]. He arrived at the scene of the accident 5 to 6 minutes later [Tr. p. 118]. There was no evidence whatever of the speed of the Navy car from these isolated places to the scene of the accident, or at the scene of the accident, other than the fact that the Navy car was greatly damaged. As stated hereinabove, the relative damage that would be done to a car at different speeds on a wet, slick highway is purely conjectural. Note should be made of the fact that appellee's car was also greatly damaged although it hit only a glancing blow and despite the fact that appellee's car was not as flimsy in construction as a station wagon such as that operated by the Navy here.

With no showing of speed or conduct of the Navy car except on those two isolated and distant occasions, it is believed that the Court clearly abused its discretion here. This accident occurred on the heavily traveled inland route of the Coast Highway, U. S. Highway 99, and this Court can take judicial notice of the many variable factors tending to effect or diminish speed between any two points on such a highway.

A considerable number of cases have been examined on the question as to what constitutes remoteness under the definition set forth above. No case was found wherein the Court allowed evidence of speed at such distant points as in the instances allowed by the Court in this case.

In *Pruitt v. Krovitz, supra,* the leading California case, the evidence was of speed at a distance of *one block* from the scene of the accident. In the case cited in the *Pruitt* case, *Ackel v. American Creamery Co.,* 55 P. 2d 1195 (1936), the trial court *disallowed evidence* of speed *one and one-half blocks* from the accident and the appellate court said this was not error. Some of the other cases are as follows:

Evidence of Speed Not Allowed.

Winn v. Consolidated Coach Corp., 65 F. 2d 256, C. C. A. 6 (1933) (distance one-half mile);

Gritsch v. Pickwick Stages System, 81 P. 2d 257, 27 Cal. App. 2d 494 (distance one mile);

Grand v. Kasviner, 153 Pac. 243, 28 Cal. App. 530 (distance 5 blocks);

Stevens v. Potter, 209 Ky. 705, 273 S. W. 470 (distance ¼ mile);

Ramp v. Osborne, 115 Or. 672, 239 Pac. 112 (distance 4 to 5 miles);

Young v. Campbell, 177 Pac. 19, 20 Ariz. 71 (speed before accident inadmissible where speed at scene of accident not proved);

Prince v. Petersen, 12 N. W. 2d 704, 144 Neb. 134 (distance 2½ miles);

Wright v. So. Carolina Power Co., 31 S. E. 2d 904, 205 S. C. 327 (distance one block);

Barnes v. Teer, 10 S. E. 2d 614, 218 N. C. 122 (distance three to four miles);

Neyens v. Gehl, 15 N. W. 2d 888, 235 Iowa 115 (distance 8 to 10 miles);

Hutteball v. Montgomery, 60 P. 2d 679, 187 Wash. 516 (distance several miles);

Gough v. Harrington, 141 So. 280, 163 Miss. 393 (distance several hundred yards);

Utility Trailer Works v. Phillips, 29 So. 2d 289, 249 Ala. 61 (distance 4 to 10 miles);

Rzeszewski v. Barth, 58 N. E. 2d 269, 324 Ill. App. 345 (distance 6 blocks).

Evidence of Speed Allowed.

Dromey v. Interstate Motor Freight Service, 121 F. 2d 361, C. C. A. 7 (allowed distance 1½ miles *where corroborated by evidence of speed at scene of accident*);

Melville v. State of Maryland to Use of Morris, 155 F. 2d 440, C. C. A. 4 (1946) (allowed speed at distance of 300 yards where only 15 seconds separated witness and accident);

Sosnowski v. Lenox, 53 A. 2d 388, 133 Conn. 624 (distance 2 blocks plus other evidence);

Reardon v. Marston, 38 N. E. 2d 644, 310 Mass. 461 (distance 80 feet);

Johnson v. Farrell, 298 N. W. 256, 210 Minn. 351 (allowed distance ½ mile *where followed to scene of accident*);

Long v. Mild, 149 S. W. 2d 853, 347 Mo. 1002 (allowed distance several miles where witness followed car to within 3½ blocks of accident);

Walsh v. Murray, 43 N. E. 2d 562 (allowed distance ½ mile);

Ries v. Cheyenne Cab & Transfer Co., 79 P. 2d 468, 53 Wyo. 104 (1938) (allowed distance two blocks);

Still v. Swanson, 27 P. 2d 704 (Wash. 1933) (constant *evidence of speed followed to scene of accident admissible);*

Hanson v. Schrick, 85 P. 2d 355, 160 Or. 397 (1938) (exclusion of speed at 1½ miles held abuse of discretion where evidence conflicting on speed at scene of accident);

Lundgren v. Converse, 93 P. 2d 819, 34 Cal. App. 2d 445 (distance 1½ miles, evidence allowed);

Stubbs v. Allen, 10 P. 2d 983, 168 Wash. 156 (distance ½ mile, evidence of speed allowed *where witness observed car to scene of accident*).

The appellant's conclusion is that from all the cases cited above, it is clear that none of these courts contemplated the admission of evidence of speed of a vehicle at such great distances as was allowed here. In the cases where allowed, there were additional factors other than the mere observance of speed at an isolated point not contiguous to the point of impact. It is therefore felt that the trial court clearly abused its discretion in the present case and that this is reversible error.

(e) The Court Erred in Permitting Don McCoy to Be Called and Examined as an Adverse Witness by Appellee Under the Provisions of Rule 43(b), F. R. C. P.

In the present action, appellee was the plaintiff and the appellant, Department of the Navy; Twelfth Naval District; Golden State Co., Ltd., Don Arthur McCoy and others were originally defendants. All parties defendant except appellant were dismissed from the action either voluntarily or by the Court. (Opinion rendered by the Honorable Leon R. Yankwich, 7 F. R. D. 705, on the ground that the United States above is a proper party defendant under the Federal Tort Claims Act.)

In the Superior Court of Madera County, California, the widows of the two Navy men who operated appellant's vehicle brought an action for wrongful death naming this appellee, Golden State Co., Ltd., and Don Arthur McCoy as defendants.

Counsel for appellee recited these facts in asking the trial court to permit the calling of Don McCoy as an adverse party witness pursuant to F. R. C. P., Rule 43(b). The discussion of the question and the Court's remarks and ruling are found at pages 118 to 121, inclusive, of the printed Transcript of Record.

Rule 43(b), F. R. C. P., reads as follows:

> "(b) *Scope of Examination and Cross-Examination.* A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party . . . and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party . . ."

The Court indicated that this witness was not hostile [Tr. p. 120]. The Court presumed that as McCoy was a party to the action pending in the State Court, he would be an unwilling witness here [Tr. pp. 120, 121]. This presumption is believed to be unjustified inasmuch as McCoy would be unwilling and hostile as to the United States, this appellant, rather than to appellee, because McCoy's adversaries in the State Court were the widows of the Government employees. Appellee was only a co-defendant in that action.

The Court went further and held McCoy to be an adverse party within the meaning of F. R. C. P. 43(b). As Golden State Co., Ltd., and McCoy were dismissed from this action, McCoy can hardly be considered an adversary at this time.

The adversary rules of Rule 43(b) and California Code of Civil Procedure, Section 2055, were adopted to prevent an *adversary* from concealing prejudicial facts to his advantage and to the detriment of the other party. Such is not the case here. McCoy's testimony in this action would not prejudice himself or his employer here, nor would any finding of negligence of either party in this case prejudice him in the Superior Court action. It is submitted that Don McCoy is not an adverse party within the meaning of the rule. An examination of the cases construing Rule 43(b) and Code of Civil Procedure Section 2055 has not disclosed a definition of an "adverse party" in any situation analogous to that presented here.

The examination pursuant to Rule 43(b) permitted appellee to introduce the statement made by McCoy on the night of the accident which, though disavowed by McCoy as a pure conclusion or guess [Tr. pp. 129, 157], was

obviously the main point upon which the Court reached a conclusion of negligence on the part of appellant. For this reason, the ruling of the Court was highly prejudicial and for the reasons stated above, is believed to be error.

(f) The Court Erred in Overruling the Appellant's Objections to the Appellee's Findings of Fact.

On June 3, 1948, the appellant filed its Objections to Plaintiff's Findings of Fact and Conclusions of Law. The objection was directed at Paragraph I of said findings wherein the Court adopted the allegations of the complaint that "defendant, United States of America, by and through its employees and agents, Richard Francis Rogers and Roger Davis Green, negligently drove, operated and used a Ford station wagon owned by defendant, United States of America, and thereby caused said Ford station wagon to collide with a Ford sedan automobile owned and driven by plaintiff, Ernest J. Uarte, and caused said Ford sedan automobile to come into collision with a truck owned by Golden State Company, Ltd. . . ."

Appellant has heretofore discussed at great length the fact that the evidence does not support such a finding. The record does not show wherein the Government car ever came into contact with the Uarte car. There is no evidence of physical damage or paint marks indicating that the two cars came in contact with each other. The only witness stated that he never saw any contact between them. Furthermore, the trial court disbelieved this theory as indicated in its remarks upon argument of the case [Tr. pp. 298-308 incl.]. The Court stated, in relation to witness McCoy, the truck driver, who had stated that Uarte hit him first, "As a matter of fact, I wouldn't be surprised but what it wasn't the station wagon that

got out of line and came along and smacked him, then." This position was untenable in light of the physical evidence that Uarte did, in fact, strike McCoy's truck first, and the Court then withdrew to the safer ground afforded by the appellee's complaint. The Court also disbelieved the physical evidence and testimony that the McCoy truck jackknifed, although appellee so believed and considered that part of his case, when the Court said [Tr. p. 309]: "Well, how is the truck going to turn around, be going around another direction, a 55,000 pound outfit, within a short space?" This indicates we believe, that Court did not fully grasp the factual situation as it existed in this case. As the evidence does not support the finding that the Navy car *collided* with the Uarte car, it is respectfully submitted that this was error.

II.

The District Court Erred in Not Granting Judgment for Appellant on Its Counter-Claim.

This matter has been fully covered in the factual discussion hereinabove. There is no evidence of negligence or contributory negligence on the part of the Government employees. However, there is evidence that appellee swerved sharply across the highway [Tr. pp. 125, 144], causing the truck driver to lose control of his truck [Tr. pp. 139, 155], and causing the truck to jackknife into the southbound lane of traffic [Ex. 13, 14], thus involving the Government car. This, it is submitted, constituted sufficient negligence on the part of appellee to allow recovery to the appellant on its counterclaim. Failure to so find this appellant contends to be error.

Conclusion.

Therefore, this appellant respectfully submits that a careful examination of the transcript will reveal that there is not one particle of evidence, much less a preponderance of the evidence to show negligence on the part of appellant, its agents or employees. It will also reveal that the trial court did not grasp the significance of the facts presented and that said Court permitted itself to be swayed and prejudiced by inadmissible evidence. In addition, there are several errors of law set forth herein, any one of which would justify a reversal of the judgment which is the subject of this appeal. It is again respectfully urged that this Honorable Court reverse the judgment heretofore entered for the appellee herein and render a judgment for the appellant on its counterclaim.

Respectfully submitted,

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